

April 19, 2023

Submitted online via electronic form at FOIAonline.gov

Regional FOIA Officer
US EPA, Region 8
1595 Wynkoop St.
Denver, CO 80202-1129

RE: Freedom of Information Act Request seeking information related to the State of Montana's submission of an addendum to its 2020 Integrated Report and Region 8 EPA's communications regarding this matter

Dear R8 EPA FOIA Officer:

Upper Missouri Waterkeeper, Inc. (UMW) hereby requests records, as described below, pursuant to the Freedom of Information Act (FOIA). 5 U.S.C. § 552 *et seq.* UMW requests disclosure of all requested records including any and all nonexempt portions of records that are otherwise determined to be exempt from review under the FOIA. 5 U.S.C. §552(b). The timeframe of this request is January 1, 2022 to present. We request any and all records that refer or relate to the following:

1. Documentation and any associated narratives submitted to EPA by the State of Montana as an Addendum/amendment to its 2020 Integrated Report pursuant to the Clean Water Act, including specifically a proposal and subsequent finding that the middle segment Gallatin River is impaired at law;
2. Discussion and communication between R8 EPA and the Montana Dept. of Environmental Quality (MDEQ) concerning:
 - a. a petition to list the middle segment Gallatin River as impaired;
 - b. middle segment Gallatin River algal blooms;
 - c. middle segment Gallatin River nutrient pollution and/or nutrient water quality standards;
 - d. prospective middle segment Gallatin River Total Maximum Daily Load(s);
 - e. numeric and/or narrative water quality criteria and/or other evidence supporting a determination of the middle segment Gallatin River as impaired for "algal blooms" or nutrients

This request is not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you, or your office, have destroyed or decide to withhold any documents that could be reasonably construed to be responsive to this request, we ask that you indicate this fact and the reasons therefore in your response.

Upper Missouri Waterkeeper looks forward to a response and determination from your office within twenty working days of receipt of this request, consistent with 5 U.S.C. § 552(a)(6) of the FOIA, and 40 C.F.R. § 2.104 of EPA's regulations. If this request is denied in whole or in part, we request a detailed description of, at a minimum: (1) a detailed index/list of the records withheld, including the name of the record, the subject of the record, the author of the record, and the date of the record; as well as (2) EPA's basis for withholding the records. *See Church of Scientology Intern. v. U.S. Dept. of Justice*, 30 F.3d 224, 227 (1st Cir. 1994); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974).

EXEMPT RECORDS

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for Upper Missouri Waterkeeper to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder to Upper Missouri Waterkeeper as required by 5 U.S.C. § 552(b).

Finally, even if you ultimately conclude that the requested records are exempt from mandatory disclosure under FOIA, we request that you disclose them nevertheless, pursuant to the Agency's powers of discretionary release under the FOIA. Such disclosure would serve the public interest of educating citizens regarding the operations and activities of R8 and the MT DEQ regarding the water quality programs that are the subject of this request. This issue was directly addressed in the Guidance provided by the Department of Justice's Office of Information Policy ("OIP"): President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines *Creating a "New Era of Open Government"* (available for download at <http://www.usdoj.gov/oip/-foiapost/2009foiapost8.htm> (last visited October 1, 2013)). The OIP noted the initiatives embodied both by the Presidential and Attorney General's mandates and instructed that:

The key frame of reference for this new mind set is the purpose behind the FOIA. The statute is designed to open agency activity to the light of day. As the Supreme Court has declared: "FOIA is often explained as a means for citizens to know what 'their Government is up to.'" *NARA v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The Court elaborated that "[t]his phrase should not be dismissed as a convenient formalism." *Id.* at 171-72. Rather, "[i]t defines a structural necessity in a real democracy." *Id.* at 172. The President's FOIA Memoranda directly links transparency with accountability which, in

turn, is a requirement of a democracy. The President recognized the FOIA as “the most prominent expression of a profound national commitment to ensuring open Government.” Agency personnel, therefore, should keep the purpose of the FOIA -- ensuring an open Government -- foremost in their mind.

Second, agencies should be mindful not to review records with the sole purpose of determining what can be protected under what exemption. Instead, records should be reviewed in light of the presumption of openness with a view toward determining what can be disclosed, rather than what can be withheld. For every request, for every record reviewed, agencies should be asking “Can this be released?” rather than asking “How can this be withheld?”

Third, in keeping with the Attorney General’s directive, agencies “should not withhold information simply because [they] may do so legally.” Information should not automatically be withheld just because an exemption technically or legally might apply. Indeed, if agency personnel find themselves struggling to fit something into an exemption, they should be aware of the President’s directive that “[i]n the face of doubt, openness prevails.”

For the reasons above we anticipate that the EPA will release the requested information.

FEE WAIVER REQUEST

We ask that you waive all copy, clerical and other fees associated with providing information responsive to this request.

The FOIA requires agencies to furnish documents to information requesters free of charge, or at a reduced rate, “if disclosure of the information is in the public interest.” 5 U.S.C. § 552(a)(4)(A)(iii). Such disclosure is in the public interest if “it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* While a FOIA requester bears the initial burden of making a prima facie showing of entitlement to a fee waiver, *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-85 (9th Cir.1987), once that threshold has been satisfied, the burden shifts back to the agency to substantiate denial of a waiver request. The prima facie test is not intended to be a difficult one to satisfy, as the Ninth Circuit has held a requester meets this burden in situations in which “They identified why they wanted the [requested information], what they intended to do with it, to whom they planned on distributing it. . .” *Friends of the Coast Fork v. BLM*, 110 F.3d 53, 55 (9th Cir.1997).

As you consider our fee waiver request, please recall that in enacting FOIA, Congress was “principally interested in opening administrative processes to the scrutiny of the press and public.” *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974). To further this policy, FOIA requires that documents must be provided without charge or at a reduced charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

Upper Missouri Waterkeeper works to solve environmental problems that threaten waterways, natural resources, and communities of Southwest and West-Central Montana's Upper Missouri River Basin. Upper Missouri Waterkeeper advocates using law, economics, science and public education to design and implement strategies that conserve natural resources, protect public and watershed health, and promote vital communities in our region. Upper Missouri Waterkeeper has an established advocacy center in Southwest Montana and is a leader in addressing important environmental policy affecting Montana's water quality, watersheds and communities. Upper Missouri Waterkeeper is a non-profit, member-supported organization with no commercial interest in obtaining the requested information. Instead, Upper Missouri Waterkeeper intends to use the requested information to inform the public, so the public can understand and meaningfully engage in the Montana DEQ's decisionmaking concerning pollution controls, NPDES permitting, and river restoration planning under the Clean Water Act.

As explained more fully below, the above-referenced FOIA request satisfies the factors listed in the EPA's governing regulations for "Waiver or Reduction of Fees" as well as the requirements of fee waiver under the FOIA statute – that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(iii), *see also* 40 C.F.R. § 2.107(l)(1).

1. The subject matter of the requested records must specifically concern identifiable "operations and activities of the government." 40 C.F.R. § 2.107(k)(2)(i).

The requested records relate to EPA R8's interaction with Montana DEQ, an entity subject to regulation by the Agency. Further, responsive documents will necessarily pertain to EPA's implementation of the federal Clean Water Act and FOIA. These undertakings are unquestionably "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. There can be no question that this is such a case.

2. The disclosure of the requested documents must have an informative value and be "likely to contribute to an understanding of Federal government operations or activities." 40 C.F.R. § 2.107(l)(2)(ii).

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of EPA's decisions because they are not otherwise in the public domain and are not accessible other than through this FOIA request.

In fact, Upper Missouri Waterkeeper has already informally requested the aforementioned documentation from both the State of Montana and EPA, and both agencies have denied those requests unless and until a FOIA is filed. As the Montana DEQ moves forward in, presumably, a

TMDL process for a category 5 designation of the middle segment Gallatin River, it is important for information relating to government considerations and rationales involving that determination and forthcoming process be made available to the public.

It is equally important that the nature and scope of the Agency's relationship with Montana DEQ, and rationale for any encouragement or support of Montana's proposed impairment listing for the middle segment Gallatin River, be subject to public oversight. The information sought will facilitate meaningful public participation in Montana DEQ's implementation of water quality planning and pollution control under the Clean Water Act, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of the EPA R8's decisionmaking process with regard to Montana's amendment of its 2020 Integrated Report and a new impairment determination for the middle segment Gallatin River.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester — *i.e.*, expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined. 40 C.F.R. § 2.107(l)(2)(iii).

The Environmental Protection Agency (EPA) has established national water quality standards that each state is required to meet for each of its water bodies. Further, EPA has encouraged states to adopt specific criteria that better protect waterways and designated uses and assist states in implementing their delegated Clean Water Act authorities. Certain water bodies are too polluted to meet water quality standards; these waters are referred to as impaired, and become a priority for state regulation. As a result, a state is required to implement a TMDL that enforces stricter control on discharges going into the water than those waters that are not impaired. Water quality standards provide the "floor" of minimum water quality a waterway must maintain; a proposal to list the middle segment Gallatin River as impaired due to "algal blooms" implicates these rules, CWA statutory mandates, and prospective NPDES permitting.

UMW is closely involved with Montana's planning and implementation of nutrient water quality criteria and related river impairment determinations as these actions affect planning and enforcement of water quality standards within the Upper Missouri River Basin. UMW is interested in reviewing and submitting comments and research on all aspects of proposed impairment determinations, particularly in the context of state performance of Integrated Reports pursuant to Section 303(d) of the Clean Water Act, in the issuance of National Pollutant Discharge Elimination System (NPDES) permits, and in the context of existing TMDL or impaired waterways. UMW is experienced and capable in its use of the FOIA and is well-suited to evaluate R8's and the Montana DEQ's decisionmaking regarding new waterway impairment determinations.

UMW disseminates the information it receives through FOIA regarding government operations and activities through a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on UMW's website, emailing and list serve distribution to members. Each month, UMW's website receives approximately 400

visits. In addition, UMW disseminates information obtained through FOIA through comments to administrative agencies, and where necessary, through the judicial system. UMW has published, posted, and disseminated numerous summaries and articles on state implementation of the federal Clean Water Act, including the importance of strong, protective water quality standards and consistent state enforcement of Clean Water Act mandates, including the duty to designate impaired waters that are failing to fully attain their designated uses.

UMW unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent. 40 C.F.R. § 2.107(l)(2)(iv).

There is currently little information publicly available regarding EPA R8’s consideration, comments and communication with Montana DEQ concerning the state’s proposed impairment determination for the middle segment Gallatin River. In fact, the Montana DEQ has not published any substantive information regarding its formal submission to R8 EPA of the Gallatin River impairment determination, aside from admitting the submission is made as an addendum to its 2020 Integrated Report.

Absent disclosure of the requested records, the public’s understanding will be shaped only by what is disclosed by the Montana DEQ which, in our opinion, has been historically compromised in providing intelligible, transparent rationales for its decisionmaking implementing mandates of the federal Clean Water Act. The records requested will contribute to public understanding of their government’s role, or their “operations and activities” associated with decisionmaking and implementation of numeric and narrative water quality standards for nutrients, and how public comment and impairment petition requests, including those which - as here - relied on demonstrative drone media evidence and affected business owner declarations, are reviewed and acted upon by agency officials. After disclosure of these records, the public’s understanding of this project will be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i).

Upper Missouri Waterkeeper has no commercial interest in the requested records. Nor does UMW have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The requested records will be used for the furtherance of the UMW’s educational mission to inform the public on matters of vital importance to the ecological and aesthetic quality of Southwest and West-Central Montana’s Upper Missouri River Basin.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that

disclosure is “primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(3)(ii).

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the “public interest” in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, UMW has no commercial interest in the requested records. Disclosure of this information is not “primarily” in UMW’s commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of EPA R8 decisions concerning water quality protection in Montana. Because the public will be the primary beneficiary of this requested information, please waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4).

CONCLUSION

Please contact me via the information in the signature block below if additional information is necessary. Upper Missouri Waterkeeper requests that all communications not electronic in nature in response to this request be sent to its advocacy center in Montana, at 24 S. Wilson Ave, Ste 6-7, Bozeman MT 59715.

Thank you for your consideration and prompt response to this request.

Sincerely,

/s/ Guy Alsentzer, Esq.

Executive Director
24 S. Wilson Ave, Ste 6-7
Bozeman MT 59714
C: 406.570.2202
Guy@uppermissouriwaterkeeper.org